In the Supreme Court of the United States.

OCTOBER TERM, 1897.

WM. LEDBETTER, PLAINTIFF IN ERROR, v. THE UNITED STATES. No. 196.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF IOWA.

SUPPLEMENTAL BRIEF FOR THE UNITED STATES.

The brief heretofore filed in behalf of the United States was prepared before the brief for plaintiff in error was filed, and by leave of the court this supplemental brief is filed in order to respond more fully to the line of argument pursued by the plaintiff in error.

The count of the indictment on which the plaintiff in error was convicted is as follows (Rec., pp. 2, 3):

> The grand jurors of the United States of America, duly impaneled, sworn, and charged to inquire in and for the body of said southern district of Iowa,

> at a term of the United States district court begun and held at Keokuk, in said district, on the 14th day of April, A. D. 1896, in the name and by the authority of the United States of America, upon their oaths do find and present that Lewis Ledbetter, late of said district, heretofore, to wit, on the ——— day of April, A. D. 1896, in the county of Appanoose, in the southern district of Iowa, and within the jurisdiction of this court, did then and there willfully, unlawfully, and feloniously carry on the business of a retail liquor dealer without having paid the special tax therefor, as required by law, contrary to the statute in such case made and provided and against the peace and dignity of the United States of America.

It is insisted by the plaintiff in error that the charge against plaintiff in error is not set forth sufficiently, and is not as specific as is required by the rules of law applicable to indictments, in other words, that the allegations of the bill of indictment are not sufficient in law to constitute an offense under the statute. In the court below, no objection was taken to the bill of indictment anterior to the trial. Ledbetter entered his plea of "Not guilty," and, after conviction, his attorneys made motion to the court for arrest of judgment, and set forth reasons for the motion as follows (Rec., p. 5):

> That the indictment under which defendant was tried was defective, in that it stated merely conclusions of law; that the charges therein were stated in such general terms that it was impossible for the defendant to learn the particulars which constituted the crime charged; that the defendant, following a customary practice in similar cases, made a request for the particulars of such charges of the United

> States district attorney, and was refused; that by reason of such insufficient indictment and the refusal of the prosecution to furnish bill of particulars the defendant was unable to make preparation to meet the evidence of the prosecution; whereas if said indictment had been sufficient and said bill of particulars had been furnished he would have been able to meet and controvert the material evidence submitted by the prosecution.

And to this motion the counsel afterwards added another reason (Rec., pp. 5 and 6) in the way of an amendment, as follows:

> because the facts therein stated do not constitute an offense against the laws and statutes of the United States.

The question of the right of the plaintiff in error to have the United States furnish a bill of particulars, though made one of the points of exception and assignment of error in the record, is not referred to by plaintiff in error in his brief; but in the brief heretofore filed in behalf of the United States, authorities are cited to sustain the position that an application for a bill of particulars is addressed to the discretion of the court, and its decision thereon is not open to revision by a higher tribunal.

The first position claimed by the plaintiff in error in his objection to the sufficiency of the bill of indictment is that there is nothing in the generic meaning of the words "liquors" and "retail" which reasonably indicates the kinds of liquors and the quantities forbidden by the United States without the payment of the special tax of $25; and that it is impossible to charge any

crime by the use of the words "carrying on the business of a retail liquor dealer." The provisions of law established by the statutes relating to the offense with which Ledbetter is charged furnish a complete answer to this position. As stated in the brief heretofore filed, the indictment is under section 16 of the act of February 8, 1875 (18 Stat., 307), Comp. Int. Rev. Laws, 1894, section 3242a, p. 83.

> (SEC. 3242a.) *Sec. 16, act of February 8, 1875 (18 Stat., 307).* That any person who shall carry on the business of a rectifier, wholesale liquor dealer, retail liquor dealer, wholesale dealer in malt liquors, retail dealer in malt liquors, or manufacturer of stills, without having paid the special tax as required by law, or who shall carry on the business of a distiller without having given bond as required by law, or who shall engage in or carry on the business of a distiller with intent to defraud the United States of the tax on the spirits distilled by him, or any part thereof, shall, for every such offense, be fined not less than one hundred dollars nor more than five thousand dollars and imprisoned not less than thirty days nor more than two years.
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> * * * *

Eliminating the parts of the section except such as refer to the offense in this case, we have the statute as follows:

> That any person who shall carry on the business of a retail liquor dealer without having paid the special tax required by law, for every such offense shall be fined not less than one hundred dollars nor more than five thousand dollars and imprisoned not less than thirty days nor more than two years.

If the lawmakers had stopped with this statute, there might be something in the position that the allegation in this bill of indictment charging the offense to be *carrying on the business of a retail liquor dealer without paying the special tax* is indefinite; but Congress went further, and by section 18 of the act of February 8, 1875, as amended by section 4 of the act of March 1, 1879 (20 Stat., 327), Comp. Int. Rev. Laws, 1894, p. 86, provides for the tax on retail liquor dealers, and also describes in explicit terms what is necessary to constitute such a dealer. This statute is as follows:

> *Sec. 18, act of February 8, 1875, as amended by section 4, act of March 1, 1879 (20 Stat., 327).* That retail dealers in liquors shall pay twenty-five dollars.
>
> Every person who sells, or offers for sale, foreign or domestic distilled spirits, wines, or malt liquors, otherwise than as hereinafter provided, in less quantities than five wine gallons at the same time, shall be regarded as a retail dealer in liquors.

Therefore a person who actually sells or offers for sale foreign or domestic distilled spirits, wines, or malt liquors in quantities less than five gallons is a retail dealer in liquors. The act last above referred to also provides the following in regard to retail dealers in malt liquors exclusively:

> Retail dealers in malt liquors shall pay twenty dollars.
>
> Every person who sells, or offers for sale, malt liquors in less quantities than five gallons at one time, but who does not deal in spirituous liquors, shall be regarded as a retail dealer in malt liquors.

So that the allegation in a bill of indictment that one is carrying on the business of retail liquor dealer without paying the special tax is sufficient to cover any sale, or offer to sell, in quantities of less than 5 gallons, of any foreign or domestic distilled spirits; and if it were intended to charge the offense to consist in the selling of malt liquors exclusively, in quantities less than 5 gallons, then it would be sufficient to allege that he carried on the business of retail dealer in malt liquors without paying the special tax.

In the case of the *United States* v. *Remmeke*, 28 F. R., 847, the indictment charged the offense in the language of the statute, as is done in this case, namely, *carrying on the business of retail liquor dealer without having paid the special tax*. In delivering the opinion in this case, his honor, Judge Simonton, holds that the accused should be convicted under the charge in the indictment if he ever sold or had liquor on hand to be sold to anyone who applied for it, though but one sale is proved; and in the same case it is held that the fact of not having a bar-room, or the usual appliances of a retail liquor dealer, does not affect the case; that if a person has procured spirituous liquor with intent to sell it again, in small quantities, to anyone who may apply for it, or, having it on hand, determines to sell it out to anyone who applies for it, he must pay the special tax. The attempt to carry out his intent is a violation of law.

If, therefore, a person has on hand distilled spirits with intent to sell to such as apply, if he does sell, or offers to sell, in quantities less than 5 gallons, he is in

law a retail liquor dealer. I also cite *United States* v. *Barnhart*, 20 Int. Rev. Rec., p. 137.

Objection is made that the time and place of the alleged offense are not sufficiently alleged It is scarcely possible to see how the place could be more definitely set forth. I do not believe that any elementary work or decision of the courts can be found in which it is declared that more is required in a bill of indictment as to place than to charge that the offense was committed in a particular county. Of course, under special statutes, such as prohibition acts and others applicable to particular localities or communities, such as incorporated towns or townships, it would be necessary to allege the offense within the limits of such localities; but in any general offense, either at common law or by statute, I insist that it is sufficiently definite as to place to charge the offense as within a certain county. The charge in the case under consideration is that the offense was committed in the county of Appanoose in the southern district of Iowa.

The principal object in giving the name of the place in an indictment is to show that the offense was committed within the jurisdiction of the court, and the allegation that an offense was committed "*in the county of Appanoose, in the southern district of Iowa, and within the jurisdiction of this court*," the indictment being found by the grand jury for the district court of the United States in and for the southern district of Iowa, sufficiently lays the venue.

It is only necessary to charge the minor locality where the crime can be perpetrated in some place less than the

whole county. This is the law as applicable to indictments in the State courts, but the law applying to the jurisdiction of the United States courts is well settled that the jury does not come from the body of the county, and the jurisdiction is coextensive with the district. Therefore the indictment need not mention the county. (Bishop's New Crim. Proc., vol. 1, p. 230, par. 375 (2).)

The date in the indictment is "the —— day of April, A. D. 1896." The record shows (p. 3) that the indictment was returned by the grand jury and filed in court on the 28th day of April, 1896. The plaintiff in error contends that the date so alleged is not a day necessarily prior to the date of the indictment. The alleged offense must certainly have been before the finding of the indictment. Otherwise, nothing had taken place to authorize the grand jury to act. The witnesses examined by the grand jury must have sworn to some acts of Ledbetter committed before they testified or the grand jury could not have found a true bill.

It is the usual practice in offenses of this character to charge the offense in the body of the bill of indictment as on the date of the first day of the term. This is the practice in both the Federal and State courts, and is applied to all criminal offenses except capital felonies and, possibly, a few other felonies of a very high grade. There are also certain classes of offenses which can be committed on particular days, as violations of criminal laws pertaining to the Sabbath, or hunting and fishing in certain seasons of the year. Of course, in such cases the time is of essence of the offense and must be specifically alleged and proved.

The indictment in this case charges the offense on the —— day of April, 1896. The record (p. 2) shows that the court in which the bill was found by the grand jury was held beginning on the second Tuesday of April (being the 14th day of said month), 1896.

Carrying on the business of a retail dealer in liquor without having paid the special tax is in the nature of a continuing offense, and the time, so it is within the statute of limitations, is not material. There is no special reason rendering it important that the indictment in this case should allege the precise date of the crime. The allegation as to time is therefore mere form, and the time proved need not be the same as laid. (Bishop's New Crim. Proc., Vol. I, par. 386, p. 237. See also cases cited by Bishop in notes 1 and 2, referred to in the above paragraph.)

The omission to allege a particular day in April does not affect the validity of the charge. It simply amounts to charging the formal date in the bill of indictment as in the month of April, anterior, of course, to the finding and presentation of the indictment.

JAS. E. BOYD,
Assistant Attorney-General.